Supreme Court, U.S.
FILED
JAN 4 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-917 (2)

In The

Supreme Court of the United States

October Term, 1989

IN RE: HOLYWELL CORPORATION, et al.,

Debtors,

MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, HOLYWELL CORPORATION, CHOPIN ASSOCIATES, and THEODORE B. GOULD,

Petitioners,

vs.

THE BANK OF NEW YORK,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION OF RESPONDENT, THE BANK OF NEW YORK

VANCE E. SALTER, Esq.
COLL DAVIDSON CARTER SMITH SALTER & BARKETT, P.A.
3200 Miami Center
201 S. Biscayne Boulevard
Miami, Florida 33131
Tel: (305) 373-5200

[*Counsel of Record*]

Of Counsel:

THOMAS F. NOONE, Esq.
EMMET MARVIN & MARTIN
48 Wall Street
New York, New York 10286
Tel: (212) 422-2974

S. HARVEY ZIEGLER, Esq.
KIRKPATRICK & LOCKHART
2000 Miami Center
201 S. Biscayne Boulevard
Miami, Florida 33131
Tel: (305) 374-8112

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

ISSUES PRESENTED

I.

Does this Court lack jurisdiction?

II.

Did the court of appeals correctly affirm the bankruptcy and district court orders allowing The Bank of New York's claim for reimbursement of attorneys' fees and expenses as a contractual unsecured claim?

TABLE OF CONTENTS

Page(s)

Issues Presented i

Table of Citations iv

Introduction 2

Statement of the Case 3

ARGUMENTS AGAINST GRANTING THE WRIT .. 9

I. LACK OF JURISDICTION 10

A. *The Petitioners Have Failed To Establish An Appropriate Basis For This Court's Certiorari Jurisdiction* 10

B. *This Court's Prior Denial Of Review Bars This Petition* 10

II. THE COURT OF APPEALS CORRECTLY AFFIRMED THE BANKRUPTCY AND DISTRICT COURT ORDERS ALLOWING THE BANK OF NEW YORK'S CLAIM FOR REIMBURSEMENT OF ATTORNEYS' FEES AND EXPENSES AS A CONTRACTUAL UNSECURED CLAIM 11

A. *All Three Lower Courts Correctly Determined That The Bank Has An Allowable Unsecured Contract Claim For Attorney Fees and Expenses* 11

B. *All Three Lower Courts Correctly Determined The Amount Of The Bank's Claim* 13

C. *The Petitioners' Arguments Are Meritless* .. 16

1. **Post-Confirmation Attorneys' Fees and Costs** 16

TABLE OF CONTENTS – Continued

Page(s)

2. Limitation to "Collection" Provisions... 17

3. Section 506(b) 17

4. The Alleged Inadequacy of the Fee and Expense Application 19

Conclusion 20

Certificate of Service 22

TABLE OF CITATIONS

Page(s)

OPINIONS:

Birmingham Trust Nat'l Bank v. Case, 755 F.2d 1474 (11th Cir. 1985) 9

Denis v. Liberty Mutual Ins. Co., 791 F.2d 846 (11th Cir. 1986) 16

Fehlhaber v. Fehlhaber, 681 F.2d 1015 (11th Cir. 1982), *cert. denied*, 464 U.S. 818 (1983) 16

Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271 (1949) 9, 10

Holywell Corp. v. The Bank of New York, 59 Bankr. 340 (S.D. Fla. 1986) 6

In re Ely, 28 Bankr. 488 (E.D. Tenn. 1983) 12, 13

In re Garfinkle, 672 F.2d 1340 (11th Cir. 1985) 9

In re Ladycliff College, 56 Bankr. 765 (S.D.N.Y. 1985) 12

In re Martin, 761 F.2d 1163 (6th Cir. 1985) 12

In re Missionary Baptist Found. of Am., Inc., 24 Bankr. 970 (N.D. Tex. 1982) 12

In re Tri-State Homes, Inc., 56 Bankr. 24 (W.D. Wis. 1985) 12

In re 268 Ltd., 789 F.2d 674 (9th Cir. 1986) 12, 13

In re United Merchants & Mfrs., Inc., 674 F.2d 134 (2d Cir. 1982) 12, 13

LeLaurin v. Frost Nat'l Bank, 391 F.2d 687 (5th Cir. 1968), *cert. denied*, 393 U.S. 979 (1968) 12

TABLE OF CITATIONS – Continued

Page(s)

Liberty Nat'l Bank & Trust Co. v. George, 70 Bankr. 312 (W.D. Ky. 1987) 12, 13

Miami Center Ltd. Partnership v. Bank of New York, 109 S. Ct. 69 (1988) 6, 11

Miami Center Ltd. Partnership v. Bank of New York, 838 F.2d 1547 (11th Cir. 1988) 6

Rogers v. Lodge, 458 U.S. 613 (1982) 9

United Savings Ass'n v. Timbers of Inwood Forrest Assocs., Ltd., 108 S. Ct. 626 (1988) 18

United States v. Johnston, 268 U.S. 220 (1925) 9

United States v. Ron Pair Enter., Inc., 109 S. Ct. 1026 (1989) 19

UNITED STATES CODE:

11 U.S.C. § 101(4) 12

11 U.S.C. § 104(a) 16

11 U.S.C. § 362(d) (1) 19

11 U.S.C. § 501 12

11 U.S.C. § 506(a) 18

11 U.S.C. § 506(b) 13, 18

SUPREME COURT RULES:

Sup. Ct. R. 17.1 10

Sup. Ct. R. 28.1 4

TABLE OF CITATIONS – Continued

Page(s)

FEDERAL RULES:

Fed. R. Civ. P. 52 9

BANKRUPTCY RULES:

Bankr. R. 3001 12

Bankr. R. 8013 9

OTHER AUTHORITIES:

3 *Collier on Bankruptcy* ¶506.05 (15th Ed. 1986) 12

No. 89-917

In The

Supreme Court of the United States

October Term, 1989

IN RE: HOLYWELL CORPORATION, et al.,

Debtors,

MIAMI CENTER LIMITED PARTNERSHIP,
MIAMI CENTER CORPORATION, HOLYWELL CORPORATION,
CHOPIN ASSOCIATES, and THEODORE B. GOULD,

Petitioners,

vs.

THE BANK OF NEW YORK,

Respondent.

On Petition For Writ Of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION OF RESPONDENT, THE BANK OF NEW YORK

INTRODUCTION

The Petitioners are five affiliated debtors in consolidated proceedings who have presented their never-ending, frivolous, Guiness-Book-of-World Records claims and arguments over the past four years to:

Two different bankruptcy judges;

Ten different district court judges in over 50 separate appeals;

Eight judges of the United States Court of Appeals in 14 separate appeals and a petition for writ of prohibition and mandamus; and

This Court, in six separate petitions for review.[1]

In addition to the Petition in this case, there are two additional petitions for writ of certiorari currently pending before this Court. One petition for writ of certiorari was filed only on behalf of the Petitioner, Miami Center Limited Partnership.[2] The Bank of New York's brief in opposition in that case (filed December 1, 1989) was not even out the door when it received (November 29, 1989) a second petition for writ of certiorari filed on behalf of the same Petitioners that are before this Court on this Petition.[3] Just a few days later, the Petitioners served the

---

[1] In the three cases ruled upon to date by this Court, each petition was denied. Case Nos. 88-80, 87-1988 and 87-1989. References to the Petitioners' appendix will be denoted as "___ a," and references to the appendix to this Response are denoted "App. ___."

[2] Case No. 89-708.

[3] Case No. 89-864.

Petition in this case, which is their third petition for writ of certiorari in just a little over a month. Each of the petitions is frivolous. Each should be denied, as were the three petitions filed by these petitioners in 1988.

STATEMENT OF THE CASE

The five affiliated debtors – Theodore Gould ("Gould"), Miami Center Limited Partnership ("MCLP"), Holywell Corporation ("Holywell"), Miami Center Corporation ("MCC"), and Chopin Associates ("Chopin") – all filed voluntary petitions in bankruptcy on August 22, 1984. The bankruptcy cases initially were consolidated for joint administrative purposes, and the five debtor estates were later substantively consolidated by Order dated July 23, 1985.[4] Gould owned 100% of the stock of co-debtor Holywell, and also served as president and sole director of Holywell. In turn, Holywell owned 100% of the stock of co-debtor MCC, and Gould served as president and sole director of MCC. Gould and MCC were the sole general partners of co-debtor Chopin, and of co-debtor MCLP. All five debtors[5] were involved in developing the Miami Center Project, an office building and hotel complex in downtown Miami.

---

[4] Under the bankruptcy and equitable doctrine of "substantive consolidation," the assets and liabilities of related debtors are pooled, and the inter-debtor obligations are eliminated.

[5] For the purposes of this Response, the Petitioners will also be referred to as the "debtors."

Respondent, The Bank of New York (the "Bank")[6] was the lead construction lender for the Miami Center Project. Commencing in March of 1980, the Bank advanced to the debtors in excess of $196 million under the terms of a series of notes, mortgages and other loan documents.[7] The loans were in default as of February 1,

---

[6] Pursuant to Supreme Court Rule 28.1, the following is a listing of the relationships of the Bank of New York:

(a) Parent of the Bank – The Bank of New York Company, Inc.

(b) "Affiliates" of the Bank are:

BNY Holdings (Delaware) Corporation
The Bank of New York (Delaware)
The Bank of New York Overseas Finance, N.V.
Affinity Group Marketing, Inc.
ARCS Mortgage Corp. (Fla.)
ARCS Mortgage, Inc. (Calif.)
BNY Leasing, Inc.
Eastern Trust Company
The Bank of New York Life Insurance Co., Inc.
Capital Trust Company
BNY Financial Corporation
BNY Personal Brokerage, Inc.
Beacon Capital Management
The Bank of New York Trust Company, Inc.
The Bank of New York Trust Company of California
The Bank of New York Trust Company of Florida, N.A.
Leonard Newman Agency, L.P.

[7] On March 20, 1985, the bankruptcy court entered a final judgment validating the construction notes and mortgages held by the Bank. The validity and enforceability of the provisions of the notes and mortgages is not an issue before this Court. [App. 1].

1984, and the Bank commenced a state court foreclosure action in July of 1984. The debtors filed voluntary Chapter 11 proceedings on August 22, 1984.

The loans were evidenced by notes secured by mortgages and liens on real and personal property, and were cross-guaranteed, cross-collateralized and subject to the terms of certain additional loan documents. The notes and other documents evidencing, securing or otherwise relating to the loans are referred to collectively as the "Loan Documents."

On December 19, 1984, the Bank filed its proofs of claim (Nos. 228 through 232) in connection with the loans including pre-petition and post-petition attorneys' fees, costs and loan expenses pursuant to the terms of the Loan Documents, which were attached as exhibits.

On March 20, 1985, the bankruptcy court entered a Judgment Determining Amount, Validity, and Extent of Liens of The Bank of New York. In upholding the Bank's liens, the court stated:

> The Bank claims additional amounts under the liens of the mortgages for pre-petition legal and loan expenses, totaling $831,563.72. The Court reserves ruling on whether all or some part of such legal and loan expenses should be added to the mortgage lien.

[App. 1].

Both the debtors and the Bank filed proposed plans of reorganization. On August 8, 1985, the bankruptcy court confirmed the Bank's Plan (the "Plan"), the principal features of which were:

(a) substantive consolidation of the debtors' assets and liabilities;

(b) creation of a Liquidating Trust which would receive all of the assets of the consolidated debtors;

(c) the sale by the Liquidating Trustee to the Bank or its designee of the Miami Center Project, including all furniture, fixtures, and equipment, for a price of $255.6 million, consisting of (i) a credit for the Bank Debt, defined in the Plan to include principal, interest, attorneys' fees, and loan expenses, plus (ii) new cash over the amount of that credit; and

(d) the release of approximately $32 million of the Bank's cash collateral for use by the Liquidating Trustee in paying the allowed claims of creditors.

The debtors failed to obtain a stay pending review of the confirmation order. Thus, on October 10, 1985, the Liquidating Trustee began implementing the Plan in accordance with its express terms.[8]

[8] The district court affirmed the confirmation order, *Holywell Corp. v. The Bank of New York*, 59 Bankr. 340 (S.D. Fla. 1986), and the Eleventh Circuit dismissed the debtors' appeal as moot, finding that "the plan had been substantially consummated and that . . . it had become legally and practically impossible to unwind the consummation of the plan or otherwise to restore the status quo before confirmation." *Miami Center Ltd. Partnership v. Bank of New York*, 838 F.2d 1547, 1557 (11th Cir. 1988). This Court denied the Petitioners' petition for writ of certiorari from the Eleventh Circuit's order dismissing their appeal as moot. *Miami Center Ltd. Partnership v. Bank of New York*, 109 S. Ct. 69 (1988).

At the closing of the sale of the Miami Center Project on October 10, 1985 pursuant to the Plan, the Bank released the cash collateral and other security that it held as security for its claim for reimbursement of attorneys' fees and expenses, and voluntarily agreed to subordinate its claim for attorneys' fees and loan expenses to the claims of the Class 1 through 6 creditors as set forth in the Plan.[9]

On June 13, 1986, the Bank filed its Application for Allowance of Attorney's Fees, Costs and Loan Expenses (the "Fee and Expense Application") covering the period from June 9, 1983 through April 30, 1986. [App. 6]. The Liquidating Trustee, two other creditors, and the debtors filed objections. By Memorandum Decision, dated November 5, 1986, the bankruptcy court determined:

> The Bank's timely claims 228 through 232 which were filed in this case expressly asserted its claim for attorneys' fees and costs. Those claims remain subject to consideration by the court as unsecured claims.

[30a].

Depositions of the Bank's Florida and New York counsel were taken, during which counsel testified at length as to the scope of the legal services rendered as

---

[9] Under the Plan, the Bank's claim for attorneys' fees and loan expenses was part of the Bank's Class 2 claim. However, because the bankruptcy court, at the time of the closing (October 10, 1985), had not determined the amount of fees and expenses, the Bank agreed to postpone payment until the creditors in Classes 3 through 6 were paid. This allowed hundreds of creditors (that had been waiting for payment for two years) to be paid without further delay.

well as the background and experience of the lawyers performing such services. Pursuant to the Memorandum Decision dated November 5, 1986, a hearing was conducted on November 20, 1986 with respect to the amount of the Bank's claim for attorneys' fees and expenses. Prior to that hearing, the Bank supplemented the Fee and Expense Application so as to spell out in greater detail certain of the legal services covered by the Fee and Expense Application. [App. 19]. At the bankruptcy court's request during the November 20th hearing, the Bank supplied additional information regarding the Fee and Expense Application in the form of an affidavit of Thomas F. Noone, the Bank's New York counsel.

On March 11, 1987, the bankruptcy court issued a Memorandum Decision on Amount of Bank's Fees and Expenses. [14a]. On April 9, 1987, the bankruptcy court issued the "Order Allowing Reimbursement of Attorneys' Fees and Expenses to The Bank of New York (M.C. Holdings Partners)," fixing the amount payable to the Bank. [App. 23].

The debtors then appealed the April 9th ruling by the bankruptcy court to the district court. On June 30, 1988, the district court issued its Order of Affirmance of the bankruptcy court's decisions of November 5, 1986 and March 11, 1987. [9a]. After the district court denied the debtors' motion for rehearing, the debtors then appealed to the Eleventh Circuit. The Eleventh Circuit affirmed *per curiam*. [5a].

ARGUMENTS AGAINST GRANTING THE WRIT

These Petitioners are now before this Court for a sixth time. This time, the "important question of federal law" that they ask this Court to review is a bankruptcy court's determination regarding the validity and amount of a creditor's claim for attorneys' fees and expenses. That issue is neither federal, nor important, nor of any constitutional dimension. The Bank's entitlement to the fees and expenses has already been determined by five different federal judges at three separate levels of the federal judicial system. This frivolous Petition falls woefully short of the standard for matters subject to this Court's jurisdiction.

The bankruptcy court's findings as to the validity and amount of the Bank's fees and expenses are inherently fact-based determinations subject to the "clearly erroneous" standard as given "strict application." Bankr. R. 8013; Fed. R. Civ. P. 52; *Birmingham Trust Nat'l Bank v. Case*, 755 F.2d 1474, 1476 (11th Cir. 1985); *In re Garfinkle*, 672 F.2d 1340, 1344 (11th Cir. 1982).

This Court does not grant certiorari to review evidence and discuss specific facts (*United States v. Johnston*, 268 U.S. 220, 227 (1925)), and this is particularly true where findings of fact have been concurred in by both the court of appeals and the district court. *Rogers v. Lodge*, 458 U.S. 613, 623-24 (1982); *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949). In the *Graver Tank* case, Justice Jackson stated: "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very

obvious and exceptional showing of error." 336 U.S. at 275. No error, much less any "obvious" or "exceptional" error, has been shown by the Petitioner here.

I.

LACK OF JURISDICTION

A. *The Petitioners Have Failed To Establish An Appropriate Basis For This Court's Certiorari Jurisdiction*

The Petitioners not only have failed to establish any of the considerations governing review on certioari, but also have failed to even point to any basis for this Court's certiorari jurisdiction. These considerations, "while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered." Sup. Ct. R. 17.1.

The Petitioners, not satisified with an appeal to the district court and yet another appeal to the Eleventh Circuit, now seek this Court's certiorari jurisdiction. This Court, however, does not sit as a third level of review to decide fact-based issues that do not raise any important question of federal law. Consequently, the Petitioners' failure to point to any conflict or any important question of federal law weighs heavily against jurisdiction in this matter.

B. *This Court's Prior Denial of Review Bars This Petition*

The amount of attorneys' fees and collection fees to the Bank is a matter provided for, and governed by, the confirmed Plan [42a]. The debtors' current petition claims

that the Plan is defective because it could not, as a matter of law, authorize such an award.

But this Court has already closed the door on attacks on the Plan. Any objections by the debtors to the Plan were ruled upon by the district court when the confirmation order was affirmed, by the court of appeals' order dismissing the debtors' further appeal, and by this Court's refusal in 1988 to review further the debtors' complaints about the Plan. 109 S. Ct. 69 (1988).

The doctrine of *res judicata* or "law of the case" precludes the re-litigation or further review of these frivolous claims.

II.

THE COURT OF APPEALS CORRECTLY AFFIRMED THE BANKRUPTCY AND DISTRICT COURT ORDERS ALLOWING THE BANK OF NEW YORK'S CLAIM FOR REIMBURSEMENT OF ATTORNEYS' FEES AND EXPENSES AS A CONTRACTUAL UNSECURED CLAIM

A. *All Three Lower Courts Correctly Determined That The Bank Has An Allowable Unsecured Contract Claim For Attorney Fees and Expenses*

The bankruptcy court correctly determined that the Bank has an allowable *unsecured contract claim* for attorneys' fees and expenses. In the November 5, 1986 Memorandum Decision on Estate's Liability for Bank's Fees and Expenses, the bankruptcy court stated:

> Although § 506 does not expressly preserve an unsecured claim, it does not foreclose one. I see no reason to presume that the unsecured claim is barred simply because it exceeds the value of

> the pledged collateral. 3 *Collier on Bankruptcy* ¶506.05 n.5 (15th Ed. 1986).

[30a].

The provisions of the Loan Documents clearly established the Bank's right to claim its legal fees and expenses in connection with the loans and the collateral, as incurred both before and after the filing of the bankruptcy petitions. 11 U.S.C. § 101(4). Based on its contractual right to payment, the Bank timely filed proofs of claim (Nos. 228 through 232) for pre-petition and post-petition fees and expenses. It is clear that the Bank's claims were allowable, whether secured or unsecured. Bankr. R. 3001 *et seq.*; 11 U.S.C. § 501 *et seq.*

Numerous bankruptcy and appellate courts have specifically addressed the issue of the ability of unsecured or undersecured creditors to recover attorneys' fees and expenses as unsecured contractual claims. *In re United Merchants & Mfrs., Inc.*, 674 F.2d 134, 137-40 (2d Cir. 1982); *In re Ladycliff College*, 56 Bankr. 765, 769 (S.D.N.Y. 1985); *In re Ely*, 28 Bankr. 488, 491-92 (E.D. Tenn. 1983); *In re Tri-State Homes, Inc.*, 56 Bankr. 24, 25-26 (W.D. Wis. 1985); *In re Missionary Baptist Found. of Am., Inc.*, 24 Bankr. 970, 971 (N.D. Tex. 1982); *In re 268 Ltd.*, 789 F.2d 674, 678 (9th Cir. 1986); *In re Martin*, 761 F.2d 1163, 1168 (6th Cir. 1985); *LeLaurin v. Frost Nat'l Bank*, 391 F.2d 687, 691 (5th Cir. 1968), *cert. denied*, 393 U.S. 979 (1968); *Liberty Nat'l Bank & Trust Co. v. George*, 70 Bankr. 312, 316-17 (W.D. Ky. 1987).

In the leading case, *United Merchants*, the Second Circuit held that an unsecured creditor had a provable claim in bankruptcy for collection costs, including attorneys' fees, pursuant to a contractual right. The appellate court in *United Merchants* specifically rejected the argument that Section 506(b) of the Bankruptcy Code precluded the unsecured contractual claim:

> UM&M asserts that the legislative history of section 506(b) indicates that the statute was intended to codify pre-Code law that only a secured creditor can assert a contractually-based right to recover collection costs. Section 506(b), however, merely codifies pre-Code law that an *oversecured* creditor can assert, *as part of its secured claim*, its right to interest and costs arising under its credit agreement.

United Merchants, 674 F.2d at 138 (emphasis in original) (citation omitted). Furthermore, Section 506(b) does not preclude undersecured creditors from relying on contractual claims for attorneys' fees. *Ely*, 28 Bankr. at 491-92.

A creditor's unsecured contractual claim for attorneys' fees is treated the same as any other unsecured claim under Section 502. *George*, 70 Bankr. at 317; *268 Ltd.*, 789 F.2d at 678.

B. *All Three Lower Courts Correctly Determined The Amount Of The Bank's Claim*

The Fee and Expense Application covers the period from June 9, 1983 through April 30, 1986 and includes pre-petition expenses of $325,032 paid to Florida Power &

Light[10] and Turner Construction Company to preserve the Bank's collateral. The Loan Documents contain very broad language in connection with attorneys' fees and other expenses incurred by the Bank. For example, Section (4) of Article III of the Building Loan Agreement provides in pertinent part:

> (4) Borrower will (at the Initial Closing and thereafter promptly when due) pay Lender the Commitment Fee and Lender's Counsel Fees, and will pay all costs and expenses required to satisfy the conditions of this Agreement and *all costs, fees and expenses of whatsoever nature incurred by Lender in connection with the negotiation, consummation, execution, administration, assignment, sale and collection of the Loan,* without limiting the generality of the foregoing, Borrower will pay:
>
> (a) *Lender's Counsel Fees';*
>
> *To the extent Lender, after the Initial Closing, deems it necessary to employ counsel for whatever purpose relative to the Loan, the reasonable fees and expenses of such counsel shall be borne by Borrower.* Until the Loan is paid in full any fees and expenses incurred by Lender or its participants are to be paid promptly by Borrower. Borrower hereby agrees to indemnify and hold Lender harmless with respect to all fees and expenses described herein.

---

[10] If the Bank had not advanced this payment for electricity, the utility would have turned off power to an operating office building, hotel, restaurants, and parking garage. The debtors' relentless, never-say-die opposition to the recovery of such an advance by the Bank is what makes this petition and the appeals below particularly frivolous.

Section 30 of the first mortgage reads in pertinent part as follows:

> The term "attorneys' fees" as used in this Mortgage shall include, but not be limited to, attorneys' fees incurred in any and all judicial, *bankruptcy, reorganization,* arbitration, and any other proceedings, *including appellate proceedings, whether such proceedings arise before or after entry of final judgment.*

The other Loan Documents contain similarly-detailed provisions for reimbursement.

Following the Bank's filing of its Fee and Expense Application, the bankruptcy court held a hearing in connection with the services rendered and the expenses incurred. The testimony and evidence produced at the hearing, the documentary evidence contained in the Fee and Expense Application, the Supplement, the affidavits, and the depositions, fully support the amount allowed by the bankruptcy court.

As can be seen from that evidence, the bankruptcy court took a long, hard look at the Fee and Expense Application and the record, and disallowed substantial portions of the lawyers' time and costs. The bankruptcy court had been handling these proceedings for almost three years and was well aware of the complexity of the issues. With that background, the bankruptcy court found:

> Neither the debtors nor any other party had the means or the ability to untangle the mess brought to the court by the debtors. The Bank's counsel did all that could have been asked of them and they did it well.

[16-17a]. The bankruptcy court's determination of the amount allowable was not clearly erroneous, and was properly affirmed by the district court and affirmed *per curiam* by the Eleventh Circuit.

C. *The Petitioners' Arguments are Meritless*

1. Post-Confirmation Attorneys' Fees and Costs[11]

The provisions of the Loan Documents clearly established the Bank's right to claim its legal fees and expenses in connection with the loans and collateral, as incurred both before and after the filing of the bankruptcy petitions. 11 U.S.C. § 104(a). Contrary to the debtors' assertion, the confirmed Plan contained very broad language and went beyond limiting the Bank's reimbursement for attorneys' fees as a collection expense as of the closing date.

The district court's Order of Affirmance clearly recognized that the Bank's contractual claim for attorney fees and expenses included post-petition and post-confirmation fees:

> [The bankruptcy court] determined that The Bank of New York would be allowed a general unsecured claim, subordinate to the claims of other general unsecured non-insiders, for the *attorney fees incurred in collection of loans to*

---

[11] The Petitioners failed to raise this argument before the bankruptcy court, and are thus barred from doing so here. *Denis v. Liberty Mutual Ins. Co.*, 791 F.2d 846, 848-49 (11th Cir. 1986); *Fehlhaber v. Fehlhaber*, 681 F.2d 1015, 1029-31 (11th Cir. 1982).

Holywell, including fees incurred in the bankruptcy proceedings.

[9-10a] (emphasis added).

The controlling provisions for attorney fees and expenses in the Loan Documents are broadly drafted. There is no limitation of the attorney fee and expense provision to non-bankruptcy proceedings. The provisions of the Loan Documents contain broad and unambiguous provisions for reimbursement of all expenses incurred by the Bank in the bankruptcy and appellate proceedings, whether before or after confirmation.

2. Limitation to "Collection" Provisions

The debtors conveniently ignore the very broad language in the Loan Documents regarding the liabilities for attorneys' fees and other expenses incurred by the Bank in connection with the loans. The legal services in connection with the furniture, fixtures, and equipment litigation referred to by the debtors directly related to the Bank's collateral and were clearly within the scope of the provision of the Loan Documents regarding the debtors' liability for fees and expenses. Further, the bankruptcy court, being totally familiar with all the proceedings, including the Plan and the objections thereto and the furniture, fixtures, and equipment issues, determined that the litigation and appellate expenses were essential collection expenses. [22a].

3. Section 506(b)

The bankruptcy court correctly concluded that the Bank had an unsecured, contractual claim arising under the Loan Documents for attorneys' fees and loan

expenses. In the November 5, 1986 Memorandum Decision on Estate's Liability for Bank's Fees and Expenses, the bankruptcy court stated:

> Although § 506 does not expressly preserve an unsecured claim, it does not preclude one. I see no reason to presume that the unsecured claim is barred simply because it exceeds the value of the pledged collateral.

[30a].

As they did in the courts below, the Petitioners attempt to obfuscate the issue as to the status of the Bank's unsecured contract claim by applying the standards imposed by Section 506(b) of the Bankruptcy Code. The district court, in affirming the bankruptcy court's November 6th Memorandum Decision, specifically noted:

> This liability was predicated on 506(a), which "separates an undersecured creditor's claim into two parts: He has an secured claim to the extent of the value of his collateral; *he has an unsecured claim for the balance of his claim.*" Notes of Judiciary, Senate Report No. 95-989 (Emphasis added). The attorneys fees for collection of the debt are part of that claim.

[10a].

Based on that faulty premise, the debtors argue that, because the Bank was an unsecured creditor, Section 506(b) foreclosed recovery of the Bank's contract claim. The authorities cited in Section II A of this brief clearly permit the recovery by the Bank of its contract claim, whether secured or unsecured.

The debtors misconstrue *United Savings Ass'n v. Timbers of Inwood Forrest Assocs., Ltd.*, 108 S. Ct. 626 (1988).

The district court correctly noted that "the context of that case is completely inapposite: that case states that an unsecured creditor is not entitled to interest as compensation for delay caused by the automatic stay under 11 U.S.C. § 362(d)(1)." [11a at n.3]. Further, *Timbers* did not involve a confirmed plan that provided for attorney fees as an unsecured claim. Thus, the debtors' reliance on *Timbers* is inappropriate here. Likewise, the Petitioners' reliance on *United States v. Ron Pair Enter., Inc.*, 109 S. Ct. 1026 (1989) is misplaced inasmuch as this Court construed Section 506(b) in that case.

In any event, the Bank is not seeking recovery, as part of its Class 2 priority secured claim, the Bank's contractual right to attorneys' fees and expenses under Section 506(b); therefore, the status of the Bank as an oversecured or undersecured creditor is simply not a relevant issue. The Bank is asserting only an *unsecured contractual claim* for attorneys' fees and expenses.

4. The Alleged Inadequacy of the Fee and Expense Application

A simple perusal of the Fee and Expense Application and Supplement will persuade the Court that this argument is baseless. At the bankruptcy court's request, affidavits were submitted to: (1) clarify the total amount of fees and expenses incurred by the Bank and M.C. Holdings Partners, the Bank's successor in interest, for the period covered by the Fee and Expense Application, (2) to clarify the items included in the pre-petition claim of $831,563.72, (3) to specify the amount of fees and expenses incurred by the Bank for the period June 9, 1983 through October 10, 1985 and by M.C. Holdings Partners,

from October 11, 1985 through April 30, 1986, and (4) to detail the amount of the $1 million credit that the Bank deleted from its Application referred to in paragraph 9 of the Fee and Expense Application. The debtors reviewed those documents and filed responses. The bankruptcy court, having before it the Fee and Expense Application, the Supplement, the affidavits, all of the objections, the evidence produced at the November 20, 1986 hearing, and the depositions, and having almost three years of first-hand experience with all of the bankruptcy proceedings, determined that the Bank had sustained its burden of proof. This was obviously a factual determination based upon the entire record, and has not been shown to be clearly erroneous.

CONCLUSION

The Loan Documents contain broad language providing for the recovery of fees and expenses, including collection expenses, by the Bank and its successors and assigns. The Bank duly filed proofs of claim, and the bankruptcy court entered judgment upholding the validity of the Loan Documents as a lien over the Miami Center Project. The confirmed Plan also provided for the payment to the Bank of those fees and expenses.

The amount of reimbursement for fees and collection expenses is an intensely factual issue which the debtors have not seriously challenged. The bankruptcy court reviewed evidence and testimony in abundant detail, reduced the amount claimed, and entered three separate

opinions. The debtors have not shown that the bankruptcy court's findings of fact as to the amount that should be awarded are "clearly erroneous," or that the district court or court of appeals committed error in reviewing the findings. Accordingly, this Court should deny the Petitioners' petition for writ of certiorari.

Respectfully submitted,

S. Harvey Ziegler, Esq.
Kirkpatrick & Lockhart
2000 Miami Center
201 S. Biscayne Boulevard
Miami, Florida 33131
Tel: (305) 374-8112

Coll Davidson Carter Smith
Salter & Barkett, P.A.
3200 Miami Center
201 S. Biscayne Boulevard
Miami, Florida 33131
Tel: (305) 373-5200

Of Counsel:

Thomas F. Noone, Esq.
Emmet Marvin & Martin
48 Wall Street
New York, New York
10286
Tel: (212) 422-2974

By: _____
Vance E. Salter

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4th day of January, 1989, a true and correct copy of the foregoing was mailed to:

ROBERT M. MUSSELMAN, ESQ.
MUSSELMAN & ASSOCIATES
413 Seventh Street, N.E.
Charlottesville, VA 22901
Tel: (804) 977-4500

THEODORE B. GOULD, *pro se*
2565-Ivy Road
Charlottesville, Va. 22901
Tel: (804) 295-7125

HERBERT STETTIN, ESQ.
2215 AmeriFirst Building
One Southeast Third Avenue
Miami, FL 33131
Tel: (305) 374-3353

By: _____
Vance E. Salter

APPENDIX

TABLE OF CONTENTS

PAGE

APPENDICIES

A. "Judgment Determining Amount, Validity, and Extent of Liens of The Bank of New York" entered by the bankruptcy court on March 20, 1985.....App. 1

B. The Bank of New York's "Application for Allowance of Attorneys' Fees, Costs, and Loan Expenses Incurred by The Bank of New York," served on June 13, 1986. (The exhibits to this Application which were extensive are not included as part of this Appendix but were a part of the record below)..... App. 6

C. The Bank of New York's "Supplement to Application for Allowance of Attorneys' Fees, Costs, and Loan Expenses Incurred by The Bank of New York," served on November 20, 1986. (The exhibits to this Supplement which were extensive are not included as part of this Appendix but were a part of the record below)..... App. 19

D. "Order Allowing Reimbursement of Attorneys' Fees and Expenses to The Bank of New York (M.C. Holding Partners)" entered by the bankruptcy court on April 9, 1987.....App. 23

APPENDIX A

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CHAPTER 11

IN RE: HOLYWELL CORPORATION, et al., Debtors.	CASE NOS. 84-01590-BKC-TCB 84-01591-BKC-TCB 84-01592-BKC-TCB 84-01593-BKC-TCB 84-01594-BKC-TCB
THE BANK OF NEW YORK, a New York banking corporation, Plaintiff, vs. THEODORE B. GOULD, individually, as partner of CHOPIN ASSOCIATES, a Florida general partnership and as a general partner of MIAMI CENTER LIMITED PARTNERSHIP, a Florida limited partnership; MIAMI CENTER CORPORATION, a Florida corporation, as partner of CHOPIN ASSOCIATES, and as general partner of MIAMI CENTER LIMITED PARTNERSHIP; and HOLYWELL CORPORATION, a Delaware corporation, Defendants.	ADV.NO. 85-0160-BKC-TCB-A JUDGMENT DETERMINING AMOUNT, VALIDITY, AND EXTENT OF LIENS OF THE BANK OF NEW YORK

THIS CAUSE came to be heard on March 14, 1985 upon the Complaint of The Bank of New York (the "Bank") to determine the amount, validity, and extent of the Bank's mortgage liens. Having reviewed the pleadings and heard argument of counsel, it is hereby ORDERED and ADJUDGED that:

1. This Court has jurisdiction to hear and determine this cause pursuant to 28 U.S.C. §§ 157(B)(2)(K) and 1334, and has jurisdiction over the parties.

2. The Bank is a New York banking corporation located in New York, New York, and is a secured creditor of the Debtors as set forth in Proofs of Claim filed on December 20, 1984 in case numbers 84-01590-BKC-TCB, 84-01591-BKC-TCB, 84-01592-BKC-TCB, 84-01593-BKC-TCB and 84-01594-BKC-TCB.

3. Defendants, Theodore B. Gould ("Gould") and Miami Center Corporation, a Florida corporation ("MCC"), are the sole partners of defendant Chopin Associates, a Florida general partnership ("Chopin") and are the sole general partners of defendant Miami Center Limited Partnership, a Florida limited partnership ("MCLP").

4. Defendant, Holywell Corporation ("Holywell"), is a Delaware corporation with its principal place of business in Arlington, Virginia.

5. Gould, MCC, Chopin, MCLP and Holywell are the Debtors in the above-styled proceedings, having filed voluntary petitions in this Court under Chapter 11 of the Bankruptcy Code on August 22, 1984.

6. Chopin is the fee owner and MCLP is the ground lessee and the owner of all improvements and personal property on the real estate located in Miami, Dade County, Florida ("Miami Center Phase I"), as described in the loan documents attached to the Bank's Complaint in this action.

7. The due execution, delivery, recording, and authenticity of the notes, mortgages, and other loan documents is not in dispute.

8. The Bank advanced to the Debtors under the terms of the notes and mortgages the sum of $196,711,481.58, all of which is secured by the mortgages.

9. The Bank notified the Debtors by letter that the loans were in default at all times after January 31, 1984.

10. Accrued interest on the loans, determined by the Bank at the "contract" (good standing) rate, to March 14, 1985 is $33,103,184.24, and is secured by the Bank's mortgages. Based on a Prime Rate of 10.5% per annum, interest will accrue at $64,171.66 per day from March 14, 1985. Any change in the prime rate (whether up or down) will affect that daily interest figure.

11. Additional accrued interest on the loans, determined by the Bank, commenced February 1, 1984. That additional default interest of $4,528,077.11 is payable to March 14, 1985, and is secured by the loan documents. Based on a prime rate of 10.5% such default interest will accrue in the additional amount of $11,148.50 per day under the loan documents for each day from March 14, 1985 (for a total daily sum of $75,320.16). Any change in

the prime rate (whether up or down) will affect that daily interest figure.

12. The Bank claims additional amounts under the liens of the mortgages for pre-petition legal and loan expenses, totalling $831,563.72. The Court reserves ruling on whether all or some part of such legal and loan expenses should be added to the mortgage lien.

13. The lien of The Bank of New York in and to the Debtors' real and personal property identified in the loan documents as against the Debtors is superior to any other claim or interest of the Debtors in and to said real and personal property.

14. This Court will retain jurisdiction to grant such further relief as may be necessary and proper.

15. The Court finds and decides that the total lien of the Bank (including default interest from February 1, 1984) is $234,342,742.93 to March 14, 1985, plus per diem interest from March 14, 1985, at the rate of $75,320.16 per day.

16. This Final Judgment is subject to the Court's Order, dated March 20, 1985, respecting the scope of the 1983 and 1984 releases executed by the Debtors.

DONE and ORDERED in chambers at Miami, Florida, this 20 day of March, 1985.

THOMAS C. BRITTON
UNITED STATES
BANKRUPTCY JUDGE

cc: S. Harvey Ziegler, Esq.
Vance E. Salter, Esq.
Fred H. Kent, Jr., Esq.
Irving M. Wolff, Esq.

APPENDIX B

UNITED STATES
BANKRUPTCY COURT
SOUTHERN DISTRICT
OF FLORIDA

CASES NO. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

IN RE:	)	
	)	
HOLYWELL CORPORATION, et al.	)	Proceedings Under
	)	Chapter 11
Debtors.	)	
	)	

APPLICATION FOR ALLOWANCE OF ATTORNEYS' FEES, COSTS, AND LOAN EXPENSES INCURRED BY THE BANK OF NEW YORK

TO THE HONORABLE THOMAS C. BRITTON, BANKRUPTCY JUDGE:

1. Applicant, The Bank of New York (the "Bank"), was proponent of a confirmed plan of reorganization in these Chapter 11 proceedings. Pursuant to applicable law and prior Orders of this Court, the Bank respectfully seeks reimbursement of legal and loan expenses paid to:

(a) The law firm of Emmet Marvin & Martin, 48 Wall Street, New York, New York;

(b) The law firm of Therrel Baisden & Meyer Weiss, 1111 Lincoln Road, Miami Beach, Florida 33139, and its former partner, S. Harvey Ziegler, Esq. (who

recently joined the Miami office of Kirkpatrick & Lockhart, 1428 Brickell Avenue, Miami, Florida 33131);

(c) The law firm of Steel Hector & Davis, 4000 Southeast Financial Center, Miami, Florida 33131; and

(d) Turner Construction Company, Miami, Florida; and

(e) Florida Power & Light Company, Miami, Florida.

2. On March 20, 1985, this Court entered a final judgment validating the construction notes and mortgages executed by the Debtors and held by the Bank (copy attached as Exhibit "A"). Under the terms of the notes, mortgages and related loan agreements, the Bank was and is authorized to recover its loan expenses and the reasonable attorneys' fees and other costs of collection. Paragraph 12 of that final judgment reserved ruling upon the pre-petition fees and costs in the amount of $831,563.72, and Paragraph 14 provided for the retention of jurisdiction for the determination of all such fees and costs. Thereafter, this Court ruled that the Bank should set this motion for hearing after the date that applications for "Class 1 Administration Claim" fee awards were to be heard and determined [C.P. No. 1072].

3. Pre-petition and post-petition collection expenses pursuant to the terms of the loan documents were also claimed by the Bank in its proofs of claim [No. 228 through 232; December 19, 1984].

4. The Bank has not previously applied for or received any compensation from, or reimbursement for expenses by, the Debtors, nor have any promises been

made to the Bank after the commencement of these proceedings concerning compensation for services rendered or to be rendered in this case. Section 503(b)(3)(D) of the Code authorizes the Court to award the Bank for its expenses incurred in "making a substantial contribution" in these cases. Section 503(b)(4) authorizes reasonable compensation for the Bank's attorneys to the extent that the Bank, through its attorneys, made such a contribution. Here, as in *In re Richton International Corp.*, 15 B.R. 854, 856 (Bktcy. S.D.N.Y. 1981), the Bank and its attorneys substantially contributed to the successful result in these proceedings. These authorities provide another and independently sufficient basis (in addition to the Bank's proofs of claim and the Final Judgment of March 20, 1985) for the reimbursement sought in this application.

NATURE OF SERVICES

5. As the Court is aware, the Bank's amended plan of reorganization:

(a) received the support of the creditors;

(b) was duly confirmed;

(c) has resulted in the satisfaction of approximately $300 million of claims and the payment of hundreds of creditors;

(d) Has kept the Miami Center Project intact and in continuous operation; and

(e) has been affirmed on appeal despite the most vigorous attack by the Debtors and their affiliates.

6. The professional services for which compensation is sought may be categorized as follows:

(a) Pre-petition legal services rendered by Emmet, Marvin & Martin in connection with the loans and the Bank's declaration of default and initial collection efforts (various negotiations and documents for the possible restructuring or extension of the Miami Center loans).

(b) Pre-petition legal services rendered by the Meyer Weiss firm and by Steel Hector & Davis in connection with the state court foreclosure action brought by the Bank, Case No. 84-27548-CA-28.

(c) Post-petition legal services rendered to the Bank by its counsel in preparing and filing proofs of claim; preparing, filing, and defending the plan, amendments, and stipulations that were ultimately confirmed; opposing the competing Plans proposed by the Debtors; establishing the validity, extent, and priority of the Bank's mortgage liens; defending the Bank and its participating lenders in a lawsuit brought in the United States District Court by the Debtors (Case No. 85-0228-Civ-Hoeveler); representing the Bank's interest in numerous adversary proceedings relating to the rights of the Bank, other creditors, the Debtors, and the Debtors' affiliates; representing the Bank in stay and appeal bond proceedings in the Bankruptcy Court, District Court, and United States Court of Appeals; defending the Bank's interests in the numerous appeals to the United States District Court, and in remand proceedings conducted by this Court; and implementing the terms of the confirmed plan.

7. With respect to the pre-petition expenses, the Debtors agreed (Exhibit "F", page 3, subparagraph "d")

that, as of June 11, 1984, such expenses were $429,200. Those expenses included legal fees to that date, as well as $186,796.75 paid to Turner Construction Co. for construction loan inspections and related work pursuant to the January, 1982 letter executed by the Debtors (Exhibit "G"). The Bank expended a further $138,236.72 for the June, 1984 Miami Center power bill, so that the project could continue to operate.

8. The legal services categorized and described generally in the preceding paragraphs are detailed in the exhibits attached to this application:

Exhibit	*Professionals*
"B"	Emmet, Marvin & Martin
"C"	Therrel Baisden & Meyer Weiss, And S. Harvey Ziegler, Esq.
"D"	Steel Hector & Davis

SUMMARY OF TIME AND COSTS

9. The professional services rendered by the Bank's lawyers total 16,053.2 hours, and have a value, at normal hourly rates, of $2,300,991.50. The weighted average hourly billing rate in this application is $143 per hour. For purposes of this application, the Bank has reduced its claim for reimbursement by $1,000,000 (over 40%) in recognition of two factors:

(a) Because the Bank relied upon the services of three firms, there were depositions, hearings, and conferences at which the Bank was represented by more than one lawyer. While the Bank sought to use the firms efficiently, and the team approach was extraordinarily productive, legal fees were increased as a result.

(b) The attached summaries of time and activities include approximately $300,000 in value for tasks relating to the ownership of the Miami Center Project rather than to the collection of the loans and to the related litigation. Matters relating to the October 10, 1985 closing, development order issues, Intercontinental Hotel agreement, and similar legal tasks have therefore been excluded from this application.

10. In the course of rendering professional services, the Bank's lawyers have also incurred actual, necessary expenses in the amount of $229,434.25, as detailed in attached Exhibits "B", "C", and "D".

FACTORS TO BE CONSIDERED

11. *The Time and Labor Required.* As is evident to the Court from its own experience with the five consolidated cases, the amounts in controversy (approximately $350 million, counting all claims, of which the Bank claimed over $240 million), the number of parties (over 600), and the extreme litigiousness of the Debtors*, all required the

---

* It is safe to say that Mr. Gould used every measure in his efforts to block the establishment of the Bank's lien and the confirmation and consummation of the Bank's Plan. In proceedings on January 14, 1986, this Court observed:

> The pattern that is apparent to me in the Holywell cases is that Mr. Gould has rather consistently elected to go to war with lawyers on his side and in court and not to seek a prompt decision one way or another, that is the apparent pattern.

Bank and its counsel to devote extraordinary time and labor to the resolution of a monumental jumble of state and federal lawsuits, tax claims, mechanics' liens, New York arbitration proceedings, management and service agreements, leases, payroll liabilities, and more.

12. *Novel and Difficult Questions.* The promulgation of a fair, equitable, and otherwise lawful plan was made extremely difficult by several factors, including:

(a) The Gould group's complex structure, and the labyrinthine relationships and inter-company debts between affiliates;

(b) The lack of a proper inventory and accounting for the Debtors' furniture, fixtures, and equipment;

(c) The sheer number and size of claims against the five estates, and the hundreds of objections to claims filed by the Debtors;

(d) The competition for priority among various kinds of creditors other than the Bank, including the IRS, the Dade County tax authorities, judgment creditors, litigants in over 20 then-pending lawsuits, former tenants, mechanics' lien claimants, and Mr. Gould's partners and affiliates;

(e) Phantom tax issues which the Debtors repeatedly raised (as a supposed drawback to substantive consolidation) but never specifically identified or proved;

(f) Novel issues of jurisdiction and reference as between this Court and the District Court, raised by the Debtors in March, 1985 in an effort to avoid going to trial in the adversary proceeding brought by the Bank to prove its lien, and requiring hearings in both Courts;

(g) The uncertain rights and interests of Mr. Gould and O&Y as partners of MCJV, because of the proceedings before a New York City arbitration panel, the United States District Court, and the United States Court of Appeals for the Second Circuit; and

(h) The proposal of competing plans by the Debtors, based on (i) an unusual contract with Hadid Investment Group, Inc., of Arlington, Virginia and (ii) the equitable subordination under 11 U.S.C. § 510 of the Bank's liens and claims.

13. *The Skill Requisite to Perform the Services.* The Bank's attorneys were required to apply a broad variety of legal and accounting skills, and relied heavily upon specialists, including those in the areas of:

(a) Bankruptcy and bankruptcy litigation;

(b) Banking and bank loan documentation;

(c) Construction law and construction litigation;

(d) Real estate law, including title work, loan documentation, landlord-tenant issues, and conveyancing;

(e) Taxation, including federal income taxes and local ad valorem taxes; and

(f) Usury and RICO claims (because such claims among others, were asserted by the Debtors against the Bank and its participants in the District Court in Case No. 85-0228-Civ-Hoeveler).

When possible and practical, work was delegated to associates or to paralegals in an effort to reduce expenses.

14. *The Amount Involved and the Results Obtained.* The Bank sought to protect over $240 million due in principal and interest. Pursuant to a creative creditor's Plan, and by agreeing to waive the higher "default rate" of interest for purposes of the Plan, the Bank has recovered real estate with an appraised value equal to the sum of the Bank's lien and the additional cash invested by the Bank. Junior creditors would have recovered little, if anything, in a liquidation, or if the proceedings had continued for another year (because of the enormous interest accrual, exceeding $2 million per month). Instead, junior creditors have (other than those affiliated with the Debtors) recovered 100 cents on the dollar, plus interest. The Bank protected the interests of the unaffiliated creditors by refusing to permit Mr. Gould's affiliates (including other Debtors and non-Debtors) to receive distributions until the unaffiliated creditors received full payment. To do otherwise would have resulted in equity-like distributions to claimants under Mr. Gould's control before the unaffiliated creditors received full payment. It was necessary for the Bank to proceed with all possible speed in order to prevent the accruing interest on the secured loan from destroying the concept of the Plan, and the availability of sufficient cash to pay unsecured creditors.

The Miami Center project, including the hotel and office building, has been kept in operation. The fact is of great importance to Miami's downtown development efforts. A liquidation might well have resulted in the shutdown of the facility, damaging the City's development image and momentum.

The Bank and its counsel wish to stop short of bragging, but respectfully submit that these reorganizations are a textbook example of what can and should happen in a complex real estate reorganization.

15. *The Experience, Reputation and Ability of the Attorneys.* Emmet, Marvin & Martin, a well-respected Wall Street firm, has provided legal services to The Bank of New York for over 150 years. The firm's Martindale-Hubbell listing is attached as Exhibit "E", in order that the Court may verify the background and experience of the firm's attorneys.

The local firms of Therrel Baisden & Meyer Weiss and Steel Hector & Davis are known to the Court.

16. *The "Undesirability" of the Case.* Representation of the Bank in these cases was by no means undesirable, and the Bank's attorneys are proud to have had that privilege. However, the rapid pace and broad scope of the proceedings, particularly during the periods between January and August, 1985 and between October, 1985 and March, 1986, did require extensive night and weekend work. Emergency hearings were conducted by District Judge Hoeveler at night, well after business hours, and by this Court on a Saturday. The stay and appeal proceedings were conducted on expedited briefing and argument schedules.

17. *The Nature and Length of the Professional Relationship.* Prior to these proceedings, Emmet, Marvin & Martin and Therrel Baisden & Meyer Weiss had represented the Bank in numerous matters.

18. *Awards in Similar Cases.* The compensation sought by the Bank's attorneys is commensurate with allowances in similar cases where comparable results have been obtained through the diligence and skill of counsel. Such compensation is reasonable in that the services rendered were of high quality and in that the compensation prayed for is based on hourly rates which the Bank's attorneys customarily charge commercial clients for services of the same type and quality.

19. *The Customary Fee.* For services of the type rendered the Bank in these reorganization proceedings, the Bank's attorneys would charge a private client on one of the following bases: reasonable fee for services rendered, fee based on hourly rates, contingent fee, or fixed fee. Reasonable fee for services rendered is, however, the usual and customary basis which the attorneys use to fix fees, except as to certain regular clients, who pay hourly fees.

20. *Whether the Fee is Fixed or Contingent.* The fees charged by the Bank's attorneys are not based upon a percentage of the funds or property recovered.

21. *Time Limitations Imposed by the Client or Other Circumstances.* In these cases, the Bank's counsel were frequently faced with tight deadlines for filing objections, their own Plans and amendments, adversary proceedings, and briefs. These cases precluded the Bank's primary lawyers assigned to the cases from undertaking other matters for most of the time the cases and related appeals have been pending.

WHEREFORE, the Bank respectfully prays for the reimbursement of pre-petition and post-petition professional fees of $1,300,991.50; reimbursement of actual, necessary costs incurred in the amount of $229,434.25; and pre-petition loan expenses of $325,033.47 (Florida Power & Light and Turner Construction), for a total payment of $1,855,459.22. All such fees, expenses, and costs have been paid by the Bank.

Respectfully submitted this 13th day of June, 1986.

Attorneys for The
Bank of New York

EMMET MARVIN & MARTIN
48 Wall Street
New York, New York 10005
Tel: (212) 422-2974

KIRKPATRICK & LOCKHART
1428 Brickell Avenue
Miami, Florida 33131
Tel: (305) 374-8112

By: /s/ Vance E Salter
for S. Harvey Ziegler
(on behalf of his present
firm and former firm,
Therrel Baisden &
Meyer Weiss)

STEEL HECTOR & DAVIS
4000 Southeast Financial Center
200 South Biscayne Blvd.
Miami, Florida 33131-2398
Tel: (305) 577-2804

By:/s/ Vance E Salter
Vance E. Salter

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by mail this 13th day of June, 1986 to the following parties:

FRED H. KENT, JR., ESQUIRE
KENT, WATTS & DURDEN
850 Edward Ball Building
P. O. Box 4700
Jacksonville FL 32201

RAYMOND W. BERGAN, ESQUIRE
WILLIAMS & CONNOLLY
839 17th St., N.W.
Washington, D.C. 20036

SCOTT D. SHEFTALL, ESQUIRE
FLOYD PEARSON RICHMAN GREER
WEIL ZACK & BRUMBAUGH, P.A.
One Biscayne Tower, 25th Floor
Miami, Florida 33131

JOHN W. KOZYAK, ESQUIRE
KOZYAK, TROPIN &
THROCKMORTON, P.A.
607 New World Tower
100 North Biscayne Blvd.
Miami, Florida 33132

ALBERT I. EDELMAN, ESQUIRE
PARKER CHAPIN FLATTAU & KLIMPL
1211 Avenue of the Americas
New York, New York 10036

IRVING M. WOLFF, ESQUIRE
HOLLAND & KNIGHT
1200 Brickell Avenue
P. O. Box 015441
Miami, Florida 33101

/s/ Vance E Salter
Vance E Salter

APPENDIX C

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In re:	Case No.
HOLYWELL CORPORATION,	84-01590-BKC-TCB
MIAMI CENTER	84-01591-BKC-TCB
LIMITED PARTNERSHIP,	84-01592-BKC-TCB
MIAMI CENTER	84-01593-BKC-TCB
CORPORATION, CHOPIN	84-01594-BKC-TCB
ASSOCIATES, and THEODORE	
B. GOULD,	
Debtors.	

_____/

SUPPLEMENT TO APPLICATION FOR ALLOWANCE OF ATTORNEYS FEES, COSTS, AND LOAN EXPENSES INCURRED BY THE BANK OF NEW YORK

Applicant, THE BANK OF NEW YORK (the "Bank"), hereby supplements its Application for Allowance of Attorneys' Fees, Costs, and Loan Expenses Incurred by the Bank, filed on June 13, 1986 and respectfully submits the following:

1. By Memorandum Decision dated November 5, 1986 this court determined, inter alia, that the Bank's unsecured contractual claim "was properly before the Court and requires a further hearing for the determination of the amount of that claim". The contractual provisions relating to the recovery of attorneys' fees, costs and expenses are contained in the loan documents which are very voluminous. To assist the Court in reviewing this application and those contractual provisions attached hereto and titled Part I to this Supplement is a summary

of the principal contractual provisions contained in the loan documents.

2. The Emmet Marvin & Martin daily time entries which contain a description of the work performed and the time charged in this matter, which have been made available to all the objectants for review, are also very voluminous. To assist the Court in reviewing the legal services rendered by Emmet Marvin & Martin attached hereto and titled Part II to this Supplement is a summary, on a month to month basis, of the work done by Emmet Marvin & Martin on this matter from June 9, 1983 through April 30, 1986. The summary was prepared after physical review of the Emmet Marvin & Martin daily time entries, which entries specified the work done and the time charged. Copies of these daily time entries are being filed on November 20, 1986. The Emmet Marvin & Martin computer runs showing the time charges, without narrative for the period from June 9, 1983 through January 31, 1984 are attached hereto as Part III. The Emmet Marvin & Martin Computer runs, without narrative, for the period from February 1, 1984 through April 30, 1986 are attached to the Bank's Application for Allowance as Exhibit "B".

3. Attached hereto as Exhibit "A" is a copy of the Bank's check in the amount of $182,444 payable to the order of Turner Construction Company. The Florida Power and Light bill for June 1984 in the amount of $138,236.72 was paid by Meyer Weiss Rose Arkin Shampanier & Ziegler with funds provided by the Bank by wire transfer.

Respectfully submitted,

Attorneys for The Bank of New York

KIRKPATRICK & LOCKHART
1428 Brickell Avenue
Miami, Florida 33131
Tel: (305) 374-8112

By: /s/ S. Harvey Ziegler
S. Harvey Ziegler

STEEL HECTOR & DAVIS
4000 Southeast Financial Center
200 South Biscayne Blvd.
Miami, Florida 33131-2398
Tel: (305) 577-2804

By: /s/ Vance E. Salter
Vance E. Salter

Of Counsel:

THOMAS F. NOONE, ESQUIRE
EMMET MARVIN & MARTIN
48 Wall Street
New York, New York 10005
Tel: (212) 422-2974

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing Supplement to Application for Allowance of Attorneys Fees, Costs, and Loan Expenses Incurred by The Bank of New York were furnished by hand this 20th day of November, 1986 to the parties listed below:

Fred H. Kent, Jr., Esq.
Kent, Watts & Durden
1400 Florida National Bank Tower
225 Water Street
Jacksonville FL 32202

Albert I. Edelman, Esquire
1211 Avenue of the Americas
New York, New York 10036

John W. Kozyak, Esquire
Kozyak Tropin & Throckmorton, P.A.
2850 Southeast Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131

Irving M. Wolff, Esq.
Holland & Knight
1200 Brickell Avenue
P. O. Box 015441
Miami, Florida 33101

/s/ S. Harvey Ziegler for
Vance E. Salter

APPENDIX D

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In Re:	:	Chapter 11
HOLYWELL CORPORATION, et al.,	:	Case Nos. 84-01590-BKC-TCB
Debtors.	:	84-01591-BKC-TCB
	:	84-01592-BKC-TCB
	:	84-01593-BKC-TCB
	:	84-01594-BKC-TCB

ORDER ALLOWING REIMBURSEMENT OF ATTORNEYS' FEES AND EXPENSES TO THE BANK OF NEW YORK (M.C. HOLDING PARTNERS)

Pursuant to this Court's Memorandum Decisions entered in these proceedings on November 5, 1986 and March 11, 1987, The Court now enters its Order awarding The Bank of New York and M.C. Holding Partners reimbursement for their attorneys' fees, prepetition expenses and costs. In order to determine the reimbursable costs, the Court directed that the sums sought in the amount of $229,434.25 as necessary costs be audited. Annexed hereto as Exhibit A is an enumeration of the costs disallowed in the total amount of $144,764.10. It is, therefore,

ORDERED that the Miami Center Liquidating Trust is charged with reimbursing The Bank of New York and M.C. Holdings Partners, jointly, the following sums for attorneys' fees and expenses in the total amount of $1,536,526.15:

Attorney's Fees 06/09/83 to 04/30/86	$1,126,824.00
Prepetition expenses (Turner Construction and Florida Power and Light)	325,032.00
Attorneys' expenses	84,670.15
TOTAL	$1,536,526.15

The Liquidating Trustee is directed to pay and discharge said sums in accordance with the order of priority previously established by duly entered orders of this Court.

DONE AND ORDERED in Miami, Florida this 9th day of April, 1987.

THOMAS C. BRITTON
THOMAS C. BRITTON
U.S. BANKRUPTCY JUDGE

Copies furnished to:

Irving M. Wolff, Esq.
S. Harvey Ziegler, Esq.
Vance E. Salter, Esq.
Thomas F. Noone, Esq.
Fred H. Kent, Jr., Esq.
John W. Kozyak, Esq.
Albert I. Edelman, Esq.
Raymond W. Bergan, Esq.

EXHIBIT A

CATEGORY		*AMOUNT*
Reproduction and photocopier charges		$ 78,127.15
Emmet Marvin & Martin	$24,582.20	
Harvey Ziegler	1,264.20	
Steel Hector & Davis	52,280.75	

Computer Research		$ 10,805.39
Emmet Marvin & Martin	$ 6,811.26	
Harvey Ziegler	-0-	
Steel Hector & Davis	3,994.13	
Word processing charges		$ 4,040.35
Emmet Marvin & Martin	-0-	
Harvey Ziegler	-0-	
Steel Hector & Davis	$ 4,040.35	
Overtime and Meals		$ 6,074.82
Emmet Marvin & Martin	$ 6,019.57	
Harvey Ziegler	-0-	
Steel Hector & Davis	55.25	
Carfare, local travel and parking		$ 2,891.74
Emmet Marvin & Martin	$ 2,550.29	
Harvey Ziegler	-0-	
Steel Hector & Davis	341.45	
Conference lunches and dinners		$ 2,315.48
Emmet Marvin & Martin	$ 2,183.53	
Harvey Ziegler	-0-	
Steel Hector & Davis	131.95	
Postage and Courier		$ 38,806.46
Emmet Marvin & Martin	$14,421.48	
Harvey Ziegler	6,607.02	
Steel Hector & Davis	17,777.96	
Lost luggage replacement and miscellaneous		$ 1,702.71
Emmet Marvin & Martin	$ 1,702.71	
Harvey Ziegler	-0-	
Steel Hector & Davis	-0-	
	TOTAL	$144,764.10

263320001/84:221